



The Climate Change Lawsuits Against Big Oil, Explained

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Introduction

Big Tobacco's [Master Settlement Agreement](#) in 1998 was the largest civil settlement in the nation's history and a transformative moment in the industry's control. The accord reached by 46 states, five United States territories, and the District of Columbia required tobacco manufacturers to pay the states billions of dollars annually in compensation for the public health crisis their products had created.

Today, an even bigger crisis looms, with increasing demands for accountability. Over a [dozen](#) federal cases have now been filed against oil companies, seeking damages for their role in causing climate change. With one exception, the cases have been brought by states or local governments that claim they and their citizens are suffering harm from climate change. (The exception is a [case](#) brought by Pacific Coast fishing companies for harm to the oceans.) The oil companies have made it clear that they will fight every inch of the way, with all of their considerable resources, against these lawsuits.

One aspect of these cases is clear: oil sold by U.S. companies is a major contributor to climate change. Twenty fossil fuel companies [account](#) for a third of the world's carbon emissions, and six of the 20 are oil companies that do business in the U.S.

Almost everyone in America has ridden in a car or bus or taken a diesel train. Natural gas powers much of the U.S. grid and heats many homes and businesses. While it seems audacious to sue companies for pursuing a business so basic to society, the plaintiffs argue that the oil companies should pay for the harm their product caused and that their conduct has been far from innocent. The high-stakes litigation involves issues ranging from whether the companies deceived the public about climate change to fine points of federal jurisdiction. The cases may fail at an early stage, proceed all the way through trial, or, like the earlier tobacco litigation, end up with some kind of global settlement.

But beyond wins, losses, or settlements, the most consequential phase of these climate lawsuits may be discovery, where courts require the oil companies to turn over documents and other information relevant to the suits, with the possibility that these disclosures will reach the public. If the plaintiffs are successful in forcing the secrets and conduct of the oil companies into the

public eye, they will potentially create a tide of negative publicity that could permanently weaken these companies, similar to what happened with the tobacco industry. The real stakes of the litigation thus may rely not so much on outcomes, but rather on the facts brought to light in the process.

What the industry knew

The plaintiffs point to a series of documents by industry scientists that acknowledged the facts about climate change from an early date. They then point to some very different positions that the industry was taking publicly. The industry responds that the quotations are cherry-picked and taken out of context.

But studies in [2017](#) and [2020](#) from two Harvard historians of science clearly show that industry scientists were well aware of mainstream climate science, an unsurprising finding given that the oil industry requires sophisticated expertise in fields such as geology, chemistry, and engineering. (The studies are limited to examining ExxonMobil and its pre-merger parents, a fair sample given Exxon's preeminent position in the industry.) As early as 1979, an Exxon scientist observed that the "most widely held theory" among scientists was that fossil fuel emissions caused warming and that further emissions "will cause dramatic environmental effects." By 1996, another internal document warned that the body of evidence pointed toward human influence on climate. Exxon scientists even published papers in peer-reviewed journals, revealing more candid views about the industry's contributions to climate change. However, these scientific journals were not aimed at the general public.

The industry's public (and not so public) positions

In general, the Harvard historians found, the balance Exxon struck between acknowledging climate science and noting remaining uncertainties shifts as you move from internal documents to technical publications to documents aimed at the general public. "Advertorials" (ads in the New York Times and elsewhere promoting Exxon's position) gave far more emphasis to doubt than to the scientific consensus.

When does "spin" become a lie? The line between misrepresentation and simply putting the evidence in the best possible light is going to be hotly debated in court. Some of Exxon's statements may well straddle—or arguably cross—the line.

For instance, a 1993 advertorial cited fringe climate deniers as if they were respected experts. A 1996 advertorial said that a warmer world would probably be "far more benign than many imagine." In 2000, another advertorial said that views on climate change are "just as changeable as your local weather forecast" and "range from seeing the issue as serious or trivial, and from seeing the possible future impacts as harmful or beneficial." It's true that the science was less clear-cut two or three decades ago than it is today, but these statements don't fairly reflect the degree of agreement among scientists at the time.

It is also worth noting Exxon's support for institutions and scientists outside the mainstream who took positions that Exxon itself did not publicly endorse. In fairness, since 2006 Exxon has

[reduced](#) funding to some groups promoting climate denial and cut off others entirely. Still, Exxon has [continued](#) to provide some support to think tanks such as the Heartland Institute that minimize the significance of climate change and oppose emission reduction policies, including the carbon tax that Exxon says it favors.

How to assess the overall body of Exxon's public and private statements isn't something to be resolved in a short explainer. At a minimum, it seems fair to say that for most of the past 30 years, Exxon has known about the findings of climate science and the risks predicted by scientists. Its public statements, however, were more likely to stress or exaggerate uncertainties as well as the practical difficulties of reducing emissions.

The public nuisance claims

The lawsuits against the oil companies contain a wide range of [legal claims](#), including claims based on misrepresentation by the oil companies. Almost all of the lawsuits feature one central claim that oil companies committed a [public nuisance](#), which is an unreasonable interference with the rights of the public. For instance, public nuisance laws have provided the basis for lawsuits against companies involved in the opioid epidemic. And California courts used a public nuisance theory to hold lead paint manufacturers responsible for the cost of mitigation.

Although the concept of public nuisance seems to comport with climate change, some have [said](#) that the public policy issues involved are too important to be left to courts. Plaintiffs will have to persuade courts that climate change isn't "too big to litigate," so to speak. They will also have to contend with arguments that producing and selling a lawful product needed by society cannot be considered "unreasonable." The evidence that has been brought forward to show deception by oil companies may be helpful in rebutting that argument.

Another issue confronting plaintiffs is causation. The chain of causation from carbon emissions to changes in the earth's climate and then to the plaintiffs' injury may be long and complex, with effects far away in space and time from the original sale of the product. Here, it may be relevant that harm from burning fossil fuels was not only foreseeable, but actually *was* foreseen by scientists and officials at Exxon. Another issue related to causation is that no single defendant was responsible for sufficient emissions to have caused dangerous climate change by itself (and hence the harm to the plaintiff). Therefore, the oil companies argue that it is unfair to single them out individually for causing a global problem. Given the size of the oil industry and the associated emissions, this argument may not be as persuasive as it might be for smaller-scale emissions.

The plaintiffs will also encounter procedural barriers. The damages demanded in these lawsuits are due to oil sold all over the world. The companies are not necessarily operated or incorporated in the state where the suit is filed. The Supreme Court has steadily made it more and more difficult since 2010 for plaintiffs in one state to sue corporations for activities in other states and countries. Lawyers call this issue "personal jurisdiction," and it is sure to be a headache for the plaintiffs suing oil companies over climate change. A [case](#) currently pending in the Supreme Court may help clarify the legal rules about personal jurisdiction.

State law and federal courts

The oil companies have a lot at stake and very deep pockets, so we can expect their teams of lawyers to fight hard on every possible issue. But before courts can even begin to decide those issues, they will first have to confront a more fundamental issue: what court will hear the cases in the first place.

The lawsuits against oil companies involve damage to people and property, just like lawsuits involving car crashes and medical malpractice. The vast majority of these cases are filed in state court, as are the suits against the oil companies. The plaintiffs suing the oil companies would prefer state courts, if only to lower the odds of facing unsympathetic conservative federal judges. The oil companies have tried strenuously to move the cases against them to federal court, undoubtedly because they share the view that federal judges would be more sympathetic.

The procedural issue over what court will hear the cases is connected with a more basic issue: Can the plaintiffs actually rely on state nuisance law, or should the lawsuits be controlled by federal law? In the early 1970s, the Supreme Court first [held](#) that lawsuits based on interstate water pollution are controlled by federal common law rather than state law. It then reversed course and said that federal common law did not apply after all. However, subject to some restrictions, the Supreme Court allowed state courts to hear cases involving interstate pollution under state law. In a [2011 case](#), the Supreme Court followed parallel reasoning to conclude that federal law did not create a right to bring suits against power plants and other emitters of greenhouse gases. The Court said that it was not addressing whether such lawsuits against carbon emitters could still be brought under state law.

The Supreme Court is currently [deciding](#) an even more arcane issue: What grounds for appeal are open to the oil companies when trial courts rule that the cases belong in state court? The statute restricts the right of a defendant to appeal such a remand order, but the oil companies think they have found a loophole. The defendants are also hoping that the Court might take the extraordinary action of throwing out the cases entirely, even though that's not an issue the Court agreed to decide. It seems unlikely that the Court will go beyond the narrow issue relating to appeals procedures.

At one level, the choice between state and federal court involves very technical doctrines that are mostly of interest to specialists in federal jurisdiction. At another level, however, the issue involves fundamental disagreements about the role of states and of courts generally in addressing climate change. In theory, those disagreements are distinct from technical issues of federal jurisdiction, but judges may find it difficult to close their eyes to these broader questions.

The larger picture

Tort actions based on climate change face a series of barriers. To begin with, plaintiffs must establish standing under federal or state law, and establish the state's jurisdiction over the oil companies. They must then persuade the court that producing fossil fuels is a public nuisance, and make the requisite showing of causation. Along the way, cases may be moved from more sympathetic state tribunals to federal court. It remains to be seen whether any cases survive this

gauntlet and make it to final judgment. Given the resources of the defendants, the plaintiffs have a long and difficult road ahead of them.

The defendants cannot afford to lose these lawsuits. Doing so would risk thousands of similar lawsuits around the world, perhaps driving them into bankruptcy. Unless the oil companies can get these cases dismissed quickly, they will have the sword of Damocles hanging over them for years as the cases wind their way through state courts. Oil company stocks have [underperformed](#) the market for the last decade, and this litigation threat only makes things worse.

However, if the litigation ever reaches the stage of discovery, and the produced information becomes available to the public, we will learn more about what oil companies knew about climate change and how they influenced public perceptions and debate. The release of such information is likely to result in bad publicity that will only encourage divestment movements, make oil company stock less appealing, and further undermine the industry. Even in the best case scenario from the industry perspective, where the companies get the cases into federal court and then dismissed at an early stage, the litigation will only serve to bring more attention to the role of the industry in causing climate change. In other words, the industry seems to face a spectrum starting with “garner bad publicity” and extending to “company goes bankrupt,” with little hope of avoiding at least some degree of harm.

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<https://theappeal.org/the-lab/explainers/the-climate-change-lawsuits-against-big-oil-explained/>

This commentary was also published by the following outlets:

Consortium News (National (online)): <https://consortiumnews.com/2021/02/02/the-climate-change-lawsuits-against-big-oil/>